No. 05-1649

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DEVON STRAFFORD, et al.,

Petitioner,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari To The Second District Court Of Appeal For The State Of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HALA A. SANDRIDGE, ESQUIRE
FOWLER WHITE BOGGS BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

Counsel for Respondent AHCA

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

As the body of this brief makes clear, this Court should deny the petition for writ of certiorari as to the question presented in the petition. In addition, and in accordance with Supreme Court Rule 15.2, Respondent raises the following objections to the question presented:

The question presented in the petition does not accurately reflect the Second District's holding because the lower proceedings never addressed any federal statute or case. If this Court grants the petition, Respondent submits the following as a more accurately phrased question:

> IF THE SECOND DISTRICT "IMPLICITLY" ADDRESSED *AHLBORN*, IT CONCLUDED THAT *AHLBORN* DOES NOT APPLY BECAUSE *AHLBORN* INVOLVES THE ANTI-LIEN STATUTE, WHICH PROHIBITS A MEDICAID LIEN ON A MEDICAID RECIPIENT'S PROPERTY PRIOR TO HIS DEATH.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Ahlborn v. Arkansas Department of Human Svcs., 397 F.3d 620 (8th Cir. 2005) 3, 4, 5, 6

Arkansas Dept. of Health and Human Services v. Ahlborn, 126 S.Ct. 1752 (2006) 6, 7, 8, 9, 10

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 4, 5

Strafford v. Fla. Agency for Health Care Admin., 915 So. 2d 643 (Fla. 2d DCA 2006) 3

Strafford v. Fla. Agency for Health Care Admin., 928 So. 2d 336 (Fla. 2006) 4

STATUTES AND RULES

42 U.S.C. § 1396p 3, 7, 8

Fla. R. App. P. 9.225 5

§ 409.902, Fla. Stat. 1

§ 409.910, Fla. Stat. 2, 3, 9

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent requests that this Court deny the petition for writ of certiorari seeking review of the opinion entered by the Second District Court of Appeal, State of Florida on October 7, 2005.

STATEMENT OF THE CASE

Respondent, the Agency For Health Care Administration ("AHCA"), cannot accept the "Concise Statement of the Facts" Petitioners, Devon E. Strafford and Michael C. Luneke, Individually, and as Co-Personal Representatives of the Estate of Lexi E. Strafford-Luneke, submit. The statement omits both facts and procedural events necessary to determine this petition. Pursuant to Rule 24.2, AHCA submits the following facts, taken verbatim from the Second District's opinion:

A. FACTS

In July 2001, the Decedent [Lexi E. Strafford-Luneke] was born at a birthing clinic in Collier County. During her birth, the Decedent suffered a lack of oxygen to her brain and remained in a vegetative state until her death on August 3, 2003. She accumulated $74,903.41 in medical bills. The Agency paid these medical expenses through Florida's Medicaid program. § 409.902, Fla. Stat.

The Co-Personal Representatives – the Decedent's unmarried parents – filed a wrongful death action against the birthing clinic and some of its employees. In the wrongful death action, the Co-Personal Representatives

sought, among other things, recovery for the medical expenses paid by Medicaid. Before the Co-Personal Representatives filed the wrongful death action, the Agency notified them several times that it held an outstanding lien on any third-party recovery in the amount of $74,903.41. The Co-Personal Representatives eventually settled the wrongful death action for a single, undivided sum of $485,000.

The Co-Personal Representatives subsequently petitioned the probate court to apportion the settlement amount between the Decedent's estate and the Co-Personal Representatives in their individual capacities. The Co-Personal Representatives calculated that the Decedent's estate should only receive an amount equal to the Decedent's medical expenses – $74,903.41. They contended that their apportionment scheme would trigger the statutory formula reduction contained in section 409.910(11)(f), thereby reducing the Agency's actual recovery from $74,903.41 to $4,986.49.[1]

In its objection to the petition, the Agency asserted that its lien attached to the entire settlement, not just the amount allocated to the Decedent's estate. The Agency

[1] The Co-Personal Representatives arrived at the $4,986.49 figure they proposed to pay to the Agency in satisfaction of its lien by first allocating $74,903.41 from the lump sum settlement amount to the Decedent's estate as representing the recovery of medical expenses. Next, the Co-Personal Representatives calculated the total of the applicable attorney's fees at twenty-five percent and all of the costs as $64,930.43. After deducting attorney's fees and costs from the amount allocated to the Decedent's estate, the net amount available to the estate was reduced to $9,972.98. From this amount, the Co-Personal Representatives proposed to pay one-half, or $4,986.49, to the Agency and the balance to the estate.

directed the probate court's attention to multiple provisions of the Act that provide that the lien shall not be reduced, prorated, or applied to only a portion of a settlement. The probate court agreed with the Agency and ruled that the express provisions of section 409.910 prohibited the reduction of the Medicaid lien. In its order denying the petition, the probate court ordered the Co-Personal Representatives to pay the Agency $74,903.41 – the full amount of its lien.

B. PROCEDURAL HISTORY

Two weeks before the Second District issued its opinion, Strafford and Luneke filed *Ahlborn v. Arkansas Department of Human Svcs.*, 397 F.3d 620 (8th Cir. 2005), as supplemental authority.

After receiving this supplemental authority, the Second District affirmed the trial court's order. *Strafford v. Fla. Agency for Health Care Admin.*, 915 So. 2d 643 (Fla. 2d DCA 2006). Analyzing Florida law, the Second District concluded that the distribution scheme in Florida's Medicaid Law, § 409.910(11)(f), entitled AHCA to the full recovery of its Medicaid lien because it required that AHCA be paid prior to any apportionment between the estate and the survivors. The Second District's opinion does not address *Ahlborn*, federal pre-emption or 42 U.S.C. § 1396p.

Once the Second District issued this opinion, Strafford and Luneke argued to the Second District that *Ahlborn* supported their rehearing motion. The Second District denied their rehearing motion.

Strafford and Luneke then sought discretionary review in the Florida Supreme Court. That court denied review. *Strafford v. Fla. Agency for Health Care Admin.*, 928 So. 2d 336 (Fla. 2006).

REASONS FOR DENYING THE WRIT

A. THE SECOND DISTRICT DID NOT ADDRESS THE APPLICABILITY OF *AHLBORN* AND THEREFORE *STRAFFORD* DOES NOT CONFLICT WITH FEDERAL LAW.

Petitioners seek review of a question that is substantially different from the issue they presented to Florida's Second District Court of Appeals. In fact, Petitioners did not present any federal questions for review below. Instead, their appeal focused solely on the interplay of two state statutes.

This omission is fatal to the subject petition because this Court "will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

Petitioners argued below that state wrongful death statutes conflicted with Florida's Medicaid Third-Party Liability Act. As such, their briefs contained no arguments regarding federal preemption of state law. Moreover, the Second District's opinion reveals no mention of federal preemption. The record contains no indication that the Second District ever considered federal preemption when it issued its opinion.

Nonetheless, Petitioners insist that the preemption issue "was raised for the first time at the appellate level." (Petition, p.7). To support this claim, Petitioners refer to the notice of supplemental authority they filed nearly a month **after** oral argument. (Petition, p.5). That notice cited *Ahlborn*, an Eighth Circuit case addressing federal preemption of state Medicaid statutes. However, Petitioners conveniently ignore the fact that, under Florida law, notices of supplemental authority cannot contain argument. *See* Fla. R. App. P. 9.225. Thus, there was no argument for the lower court to consider.

Petitioners also cite to the motion for rehearing they filed after the Second District affirmed the trial court's decision. While this motion expressly raised the issue of federal preemption, it does not change the fact that the Second District did not rule on or consider the issue of federal preemption. Indeed, this Court noted that a motion for rehearing does not constitute proper presentation of issues in the state system. *See Rotary*, 481 U.S. at 550.

Thus, this Court cannot accept review of an issue that was never properly presented for review in the state system. Given the Petitioners' failure to raise preemption as an issue in the courts below, this Court should deny certiorari review.

The petition also seems to raise state law issues that are not appropriate for review before this Court. In particular, the Petitioners discuss the operation of the wrongful death statutes with respect to Florida's Medicaid Third-Party Liability Act. (Petition pp.6-7). Petitioners restate their interpretation of a personal representative's duty to apportion a lump-sum wrongful death settlement. (Petition pp.6-7). This argument does not present a federal

question. Indeed, Florida's court system has already rejected their argument regarding the wrongful death statutes' effect on the Medicaid Third-Party Liability Act.

It is unclear why the Petitioners express their dissatisfaction with the Second District's ruling on state law issues, other than to implicitly seek Supreme Court review of those decisions as well. This Court should ignore that portion of the petition that does not discuss the Petitioners' purported federal question.

B. EVEN IF THE SECOND DISTRICT "IMPLICITLY" ADDRESSED *AHLBORN*, IT CORRECTLY DETERMINED THAT *AHLBORN* INVOLVED THE ANTI-LIEN STATUTE, WHICH PROHIBITS A MEDICAID LIEN ON A MEDICAID RECIPIENT'S PROPERTY PRIOR TO HIS DEATH; *STRAFFORD* AND *AHLBORN* ARE THUS PERFECTLY CONSISTENT AND PROVIDE NO REASON FOR THIS COURT TO ACCEPT CERTIORARI JURISDICTION IN THIS CASE.

The heart of Petitioners' argument rests on a supposed conflict between federal Medicaid statutes and Florida's Medicaid Third-Party Liability Act. Petitioners cite this Court's recent decision in *Arkansas Dept. of Health and Human Services v. Ahlborn*, 126 S.Ct. 1752 (2006), to support their purported conflict between federal and state laws.

Petitioners suggest that *Ahlborn* prohibits AHCA from applying its lien to the entire, unallocated settlement amount. (Petition pp.6, 9). A cursory review of *Ahlborn* reveals that Petitioners have wholly misconstrued this Court's ruling and rely instead on an invented conclusion

that is unsupported by case law and statutory law. Accordingly, even if the Second District "implicitly" reviewed Petitioner's federal question, it correctly determined that *Ahlborn* is inapplicable.

In *Ahlborn*, this Court examined the interplay between the federal Medicaid Anti-Lien Statute (42 U.S.C. § 1396p) and Arkansas' Medicaid lien recovery statute. The federal anti-lien statute prohibits states from attaching Medicaid liens to the property of living recipients of Medicaid assistance. The unique facts of the *Ahlborn* case invoked the prohibitions of the anti-lien provisions of 42 U.S.C. § 1396p. The facts that triggered the federal preemption issue in *Ahlborn* are not present in this case.

Like the decedent in the instant case, Heidi Ahlborn sustained serious injuries and received Medicaid benefits to pay for her medical care. The state of Arkansas received a lien on third-party benefits in an amount equal to the benefits it paid toward Ahlborn's medical care. During settlement proceedings, the state of Arkansas elected to stipulate that the medical benefits were substantially less than the amount actually incurred. However, the parties did not agree to reduce the amount of Arkansas' lien.

Ahlborn ultimately reached a settlement with the parties responsible for her injuries. Arkansas subsequently attempted to satisfy its lien out of the settlement proceeds. However, because of the stipulation, the artificially-reduced amount of medical expenses was no longer sufficient to satisfy the full value of the lien. Thus, satisfaction of the lien would require payment from other areas of the settlement not specifically earmarked for medical expenses. Since these portions of the settlement were the property of a living recipient of Medicaid benefits,

Arkansas' lien ran afoul of the anti-lien provisions of 42 U.S.C. § 1396p. This was the sole issue reviewed by this Court in *Ahlborn*. *See id.* at 1760-61 ("We must decide whether [Arkansas] can lay claim to more than the portion of Ahlborn's settlement that represents medical expenses.")

Ahlborn does not apply to this case for two critical reasons. First, this case does not involve application of a lien to the property of a Medicaid recipient who is still alive. The federal statute at issue in *Ahlborn* – 42 U.S.C. § 1396p – prohibits the application of a lien against the property of a living recipient. Petitioners seem to recognize this distinction, but fail to explain how a wrongful death settlement could be considered the decedent's property during her life. Instead, they state the irrelevant fact that "the deceased infant had no property rights beyond the right to recover for medical expenses under [Florida's wrongful death act.]" (Petition p.8). This point does not settle the necessary threshold issue of how the decedent held title during her lifetime to property that came into existence upon her death.

Second, unlike the state of Arkansas, the state of Florida never stipulated that the amount of medical bills was anything less than $74,903. Thus, even if the decedent in the instant case had not died, the lien could be wholly satisfied from the amount of the settlement allocated towards medical benefits. Contrary to Petitioners' argument, *Ahlborn* does not prohibit satisfaction of the lien from the unallocated settlement proceeds, so long as the settlement amount for medical benefits is sufficient to satisfy the lien.

Petitioners presume they have the right to arbitrarily decide how much of the settlement amount should be allocated towards medical benefits. They fail to cite a single state or federal statute that gives them the right to reduce the amount of medical damages. In fact, the right to recover medical benefits was assigned to AHCA by operation of Fla. Stat. § 409.910 when the decedent accepted Medicaid benefits. *Ahlborn* expressly ratifies this assignment:

> There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs.

Id. at 1763. Despite this clear language, Petitioners believe they wield the power to unilaterally conjure up a reduced amount of medical damages to increase their own personal recovery, as well as recovery for the other wrongful death beneficiaries. They cite no federal or state law to support this illogical conclusion, nor could they, given the policy implications behind such an unjust result.

Petitioners also misapply section 11(f) of the Medicaid Third-Party Liability Act. (Petition pp.8-9). This particular provision ensures that a lien will never completely erase a recipient's third-party benefit. For example, if AHCA holds a lien in the amount of $500,000, and the personal representatives recover a third-party benefit in the amount of $1,000, section 11(f) provides that the state will only recover roughly $500. *See* § 409.910(11)(f).

The operation of 11(f) has nothing to do with *Ahlborn*'s concerns about the state satisfying its lien out of proceeds beyond the amount of medical expenses. It merely ensures that the recipient always retains at least half of his or her third-party benefit. It is unclear why Petitioners believe 11(f) invokes the concerns raised by *Ahlborn*.

In fact, 11(f) actually prevents a potential result that Justice Stevens forewarned in *Ahlborn*. *See Ahlborn*, 126 S.Ct. at 1762, n.10. He expressed concern that – under Arkansas' statute – a Medicaid lien could wholly subsume the entirety of a recipient's third-party benefit. *Id.* In Florida, section 11(f) ensures that at least half of the third-party benefits will be available for the recipient's recovery.

In sum, AHCA has not attempted to apply its lien to the property of a living Medicaid recipient. Therefore, despite Petitioners' arguments to the contrary, *Ahlborn* does not apply in this matter. *Ahlborn* merely delineates the road map that states must follow when applying liens to third-party benefits obtained by living recipients of Medicaid funds. Even if this case involved the property of a living recipient, AHCA fully complied with *Ahlborn*'s mandate. Thus, the Second District did not err if it "implicitly" considered and rejected Petitioners' reliance on *Ahlborn*.

CONCLUSION

For the foregoing reasons, Respondent, the Agency For Health Care Administration, asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

HALA A. SANDRIDGE, ESQUIRE
FOWLER WHITE BOGGS BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

Counsel for Respondent AHCA